

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL MARIA FLORES,

Defendant and Appellant.

E047103

(Super.Ct.No. SWF022535)

OPINION

APPEAL from the Superior Court of Riverside County. John J. Ryan, Judge.
(Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI,
§ 6 of the Cal. Const.) Affirmed.

Craig C. Kling, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, and Barry Carlton and
Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Rafael Maria Flores was convicted of carrying a concealed dirk or dagger (Pen. Code,¹ § 12020, subd. (a)) and misdemeanor possession of burglary tools (§ 466). The jury also found true the allegations that he suffered a prior carjacking conviction, which qualified as a strike (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)), and a prison prior (§ 667.5, subd. (b)). Defendant was sentenced to state prison for a total term of two years 8 months. He appeals, contending there is insufficient evidence to support his conviction of carrying a concealed dirk or dagger, his counsel was ineffective by failing to request bifurcation of the guilt and prior conviction allegation phases of the trial, and the trial court abused its discretion in denying his motion to strike his prior conviction.

I. FACTS

On July 30, 2007, Officer James Duncan of the City of Hemet Police Department was alerted to a possible commission of a strong armed robbery. While driving near the location of the reported robbery, the officer saw defendant walking on the sidewalk. Officer Duncan decided to investigate defendant as a suspect. Defendant was walking southbound in the same direction that Officer Duncan was driving. The officer radioed police dispatch to inform them he had a possible suspect in view. At that point, the officer was traveling approximately 10 to 15 miles per hour. When Officer Duncan reached defendant, the officer accelerated and passed defendant in case defendant decided to run. While doing so, the officer noted defendant was not wearing a shirt and

¹ All further statutory references are to the Penal Code unless otherwise indicated.

was cradling something white with both hands. At the same time, defendant looked at the officer, became fidgety in his body movements, stiffened up, and threw something with his left hand about five to 10 feet. Officer Duncan was unable to tell what the item was and where it had come from on defendant's body. The officer was only able to see that it had been thrown from defendant's left hand after his hand left the position of cradling the white object.

The officer made a U-turn approximately 20 to 30 yards past defendant and returned to investigate. During the investigation, the officer found two full beer cans wrapped in a T-shirt. Officer Gomez arrived where defendant was detained and was asked by Officer Duncan to search the area where defendant might have thrown something. In approximately 15 to 30 seconds, Officer Gomez retrieved one piece of an aluminum scissor, with the plastic handle broken off and wrapped with black cloth. Officer Duncan testified that, based on his experience and training, an item like this is referred to as a "shank," which is a stabbing weapon. During a patdown of defendant, Officer Duncan retrieved spark plug parts, which he opined could have been used as burglary tools. It was ultimately determined that defendant had no connection to the strong armed robbery that Officer Duncan was investigating.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

On appeal, defendant contends his counsel was ineffective because he did not move to bifurcate proof of his prior carjacking conviction from the guilt phase of the trial.

A. Standard of Review

In order to prevail on a claim of ineffective assistance of counsel, defendant must show by a preponderance of the evidence both that counsel's representation fell below an objectively reasonable standard of practice, and that defendant was prejudiced by counsel's deficiencies. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 (*Strickland*)). "A claim of ineffective assistance of counsel based on a trial attorney's failure to make a motion or objection must demonstrate not only the absence of a tactical reason for the omission [citation], but also that the motion or objection would have been meritorious, if the defendant is to bear his burden of demonstrating that it is reasonably probable that absent the omission a determination more favorable to defendant would have resulted. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 876.)

B. Analysis

Prior to trial, defense counsel informed the court that because defendant was "almost certainly going to testify," and thus his prior carjacking offense would come in, the defense was not seeking to bifurcate the trial on the prior conviction allegations from the guilt phase. Counsel stated that he had spoken with defendant about this issue, defendant did not want to bifurcate, and counsel believed the decision was reasonable.

Given defendant's plan to testify and counsel's understanding that defendant's prior carjacking offense would be admissible for impeachment, defense counsel made a tactical decision not to request bifurcation. Great deference is given to counsel's tactical decisions. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Tactical errors are generally not reversible, and defense counsel's tactical decisions should be evaluated in the context

of available facts, not in the ““harsh light of hindsight.”” (*People v. Hinton* (2006) 37 Cal.4th 839, 876.) However, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” (*Strickland, supra*, 466 U.S. at p. 697.)

Ultimately, after the People rested, defendant decided not to testify. Immediately thereafter, the trial on defendant’s prior offense began. As the People point out, by the time this decision was made, it does not appear that counsel could have sought bifurcation, because all parties had agreed the court would read the charges (including prior conviction allegations) to the jury from the information.² Also, the People note that counsel may have had a tactical reason for not seeking bifurcation, namely, letting the jury know that defendant was exposed to a lengthy period of incarceration for his minor offense because of his prior conviction. Basically, defense counsel may have hoped for jury nullification based on feelings of sympathy for defendant. Given these possible tactical reasons for counsel’s action, defendant has failed to establish deficient performance.

As set out above, in order to establish such a claim, defendant must demonstrate both deficient performance and resulting prejudice, i.e., a reasonable probability that, absent the deficient performance, defendant would have obtained a more favorable result.

² Although defendant claims that, at the time he decided not to testify, “the jury had not been informed about [his] prior carjacking conviction,” the People respond that it is reasonably probable the court “read the prior conviction allegations to the jury prior to trial.” However, voir dire proceedings were not included in the transcript prepared for this appeal.

Evidence that a defendant has committed prior crimes is prejudicial, because it suggests the defendant has a criminal disposition and therefore must also have committed the current crime. (*People v. Calderon* (1994) 9 Cal.4th 69, 75.) However, the trial court instructed the jury not to consider evidence of defendant's prior carjacking conviction as proof that he committed any of the charged offenses. We presume the jury followed the court's instructions. (*People v. Bramit* (2009) 46 Cal.4th 1221, 1247.) Given the state of the evidence (see discussion, *post*), we conclude it is not reasonably probable the jury would have reached a result more favorable to defendant if the jurors had not heard evidence that he previously had been convicted of carjacking. Thus, we reject his ineffective assistance of counsel claim.

III. INSUFFICIENCY OF EVIDENCE

Defendant contends the evidence is insufficient to support his conviction of carrying a concealed dirk or dagger. Specifically, he argues, "No evidence was presented at trial indicating that [he] removed a shank from anywhere concealed on his person before one was found by Officer Gomez."

A. *Standard of Review*

"The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's

credibility for that of the fact finder.” [Citation.] “The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] “Although it is the duty of the [finder of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [finder of fact], not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt.” [Citation.]” (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

B. Carrying a Concealed Dirk or Dagger

In order to violate section 12020, subdivision (a)(4), the defendant must conceal a dirk or dagger on his or her person. (§ 12020, subd. (a)(4).) Substantial concealment is sufficient to constitute a violation. (*People v. Wharton* (1992) 5 Cal.App.4th 72, 75.) According to defendant, “[b]ecause [he] was not found to be in possession of the shank when he was detained by Officer Duncan, and Officer Duncan did not see where the shank was on [defendant’s] person, in order to find that [he] committed the necessary element of concealing the shank on his person, there would have to be sufficient evidence presented to support an inference that [he] had the shank concealed before it was thrown.” Given the evidence, defendant argues that “an inference that [he] had the shank concealed on his person is purely guess or speculation.” In response, the People argue that “a reasonable jury could conclude based upon the circumstantial evidence admitted at trial, that [defendant] had the shank concealed on his person before he tossed it aside.” We agree with the People.

According to Officer Duncan, it was bright outside and he could see defendant clearly. Defendant was not wearing a shirt, and thus, most of his waistline was visible. Officer Duncan did not see any shank in defendant's hands or in his waistband. Because the officer was responding to a strong armed robbery, he would have been looking for possible weapons on a suspect. Defendant did not have any belt or sheath where the shank could have been carried. More importantly, the officer witnessed defendant throw an object, and a shank was found in the area where the officer saw the object being thrown. Given this evidence, it was reasonable for the jury to conclude the shank found in the area where defendant threw an object came from defendant, who had concealed it on his person.

IV. MOTION TO STRIKE PRIOR

During sentencing, defendant moved to strike his prior strike offense of carjacking. Counsel submitted several letters attesting to defendant's character, which the court read. The court observed, "[Defendant] is a good worker, whether it is gardening or any other, and he has been honest around the people that he has been working with." Defense counsel argued that defendant's intent was to simply steal the car; however, the owner jumped in after him. Counsel further noted the current offense was minor and did not involve any violence, and that the prior offense was approximately seven years old. The prosecutor responded that defendant's current offense involved possession of burglary tools and carrying a weapon which "does tie to that earlier carjacking, which was a theft using force." The trial court denied the motion, noting defendant's prior was not that recent, but he had two parole violations. The court further

stated, “The current case . . . it’s down on the bottom of the ladder as far as felonies are concerned. I still need good cause to strike. I don’t have it; therefore, it is not.”

On appeal, defendant contends the trial court abused its discretion by failing to strike his prior strike allegation.

A. Standard of Review

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the California Supreme Court held that a trial court has discretion to dismiss three strikes prior felony conviction allegations under section 1385. (*Id.* at pp. 529-530.) We review rulings on motions to strike prior convictions under the deferential abuse of discretion standard. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309.) “It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance. [Citation.]” (*Id.* at p. 310.)

B. The Trial Court Did Not Abuse Its Discretion

The touchstone of the *Romero* analysis is “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” [Citation.]” (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) “[T]he

circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the . . . scheme’ [Citation.]” (*Id.* at p. 378.)

According to defendant, he “clearly has prospects and, as noted by the trial court, is a hard worker and has been honest with the people he works with.” However, the record also shows defendant’s prior offense was less than seven years prior to his current offense, he violated his parole two times, and he was back in prison as recently as June 30, 2006. His parole expired on April 25, 2007, roughly three months prior to his current offense. Moreover, the circumstances regarding defendant’s prior offense show that on December 8, 2000, the victim was loading her car with clothing from the Laundromat and had numerous purchases in the car for her family for the upcoming Christmas holiday. While getting the last load, she left the keys in the ignition and defendant jumped into the car. The victim ran to the car and grabbed the door. Defendant looked at the victim and hit the gas pedal, dragging the victim five to 10 feet. Defendant took the car to his girlfriend’s house. While unloading the car, the police arrived and defendant fled the scene. Later, when defendant was apprehended, he admitted stealing the car and knowing the victim was holding onto the door. He stated that he sped off so the victim would let go. Additionally, defendant has a juvenile matter on his record. He was involved in fighting and hitting a teacher at school, and he has a history of substance abuse. At the time of his current offense, defendant was only 26 years old.

Given the above, we cannot find that the court abused its discretion in declining to strike defendant’s prior conviction.

V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.